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IN THE

Supreme Court of the United States

OCTOBER TERM, 1946

IN THE MATTER OF PITTSBURGH RAILWAYS COMPANY, Debtor.

NO. 362.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

JULES GUGGENHEIM ET AL.

NO. 363.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

CITY OF PITTSBURGH

NO. 364.

MONONGAHELA STREET RAILWAY COMPANY and PITTSBURGH AND BIRMINGHAM TRACTION COMPANY, Petitioners,

v.

HORACE F. BAKER and JOHN A. BEATTIE, Protective Committee, etc.

REPLY BRIEF OF MONONGAHELA AND BIRMINGHAM IN SUPPORT OF PETITIONS FOR WRITS OF CERTIORARI.

This Reply Brief is filed in behalf of the above-named Petitioners (hereinafter referred to, respectively, as Monongahela and Birmingham) and in behalf of those corporations which joined in the petition for writs of certiorari of Monongahela and Birmingham.

This Reply Brief is directed to the briefs, filed by the City of Pittsburgh, Jules Guggenheim, et al., and

Horace F. Baker, et al., in opposition to the granting of the petitions for certiorari.

No threat to unified operation of the street railway lines in Pittsburgh and environs.

All of the briefs in opposition dwell upon the importance of unified operation of the street railways in Pittsburgh and environs and assume that the dismissal of the City's petition would result in the separate operation of the lines owned by various so-called Underlying Companies. Such an assumption is not warranted and ignores the realities of the situation. Neither the dismissal of the City's petition nor the dismissal of the bankruptcy reorganization proceedings, In the Matter of Pittsburgh Railways, would disturb in any material way the unified operation of the street railways in Pittsburgh and vicinity, as it has been conducted for over 44 years. Philadelphia Company (hereinafter referred to as "Philadelphia") said in its brief in the court below (p. 49):

> "There is no threat to sever unified operation, * * *."

Monongahela and Birmingham do not oppose the operation of their street railway properties as parts of a unified system, nor does either of them propose to operate its lines separately.

Philadelphia guaranteed to Monongahela and Birmingham, respectively, the maintenance and operation in public use of the demised railways equipped with the best and most improved equipment for the operation thereof (R. 893, 894).

Monongahela and Birmingham will see to it that Philadelphia carries out its guaranties. Being required so to do, Philadelphia will, of course, operate petitioners' extensive lines of street railway as parts of a unified system, comprising the other lines of street railway in the Pittsburgh District which it controls through stock ownership.

Philadelphia is a financially strong company and should not be permitted to, if it would, escape its obligations through the bankruptcy proceedings of its wholly owned subsidiary, Pittsburgh Railways.

There is no dispute as to the Master's finding that the management of the Pittsburgh railways system has heretofore rendered and still is rendering "* * * a very high standard of service to the public." (SMR Par. 773, R. 781).

The argument *in terrorem* of the respondents is, therefore, entitled to no weight.

The street railways system of Pittsburgh and environs is not unusual in so far as long-term leases are concerned.

The City characterizes this as an unusual case. In so far as the lease method is concerned, it is not unusual at all. In an Article entitled "Railroad Leases and Reorganizations" (1940), 49 Yale Law Journal 626, it is stated that 60% of the nation's Class I railroads are lessees. It is stated, further, that of existing railroad leases made prior to 1920, the greater part were for 99 years or more (p. 631).

The Chandler Act provides how leases shall be treated in reorganization proceedings (See pp. 27 and 28 of our petition).

This Court has said that long-term leases, accomplishing transfers of rights in real estate without payment of purchase price, are firmly embedded in our financial, corporate and title structures: *Palmer, et al. v. Connecticut Rwy. & Lighting Co.* (1941) 311 U.S. 544, 555.

As to the simplification of the corporate structure of the system.

The City (p. 2) quotes the opinion of the Circuit Court as referring to the Pittsburgh transportation system as "* * * the elaborate jig-saw puzzle arrangement * * *."

The corporate structure of the Pittsburgh railways system was erected by Philadelphia. It controls by stock ownership the Debtor and many other street railway corporations. It is guarantor of the leases made by Monongahela and Birmingham to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively.

Philadelphia is a public utility holding corporation and any desirable simplification of its corporate structure should be under proceedings by the Securities and Exchange Commission under the Public Utility Holding Company Act of August 16, 1935, c. 687, Title I, 49 Stat. 803; 15 U.S.C.A. §§ 79 *et seq.*

It can not be attained in the present proceedings.

The District Court held that it had jurisdiction to determine, and did determine, the rights, titles, and interests of the underliers.

The City states in its brief (p. 24) that "* * * the City's petition raises only the issue of bankruptcy jurisdiction and does not affect the parties' substantive property rights; * * *." This statement and other statements in the City's brief to the same effect confuse the issue which petitioners desire to place before this Court.

The District Court, in adopting the Conclusions of Law of the Special Master, held that it *had* jurisdiction "* * * to determine what are the rights, titles and interests of the debtor in respect of the properties in the custody of this court and to determine, to the extent necessary for the purposes of this reorganization proceeding, what are the rights, titles and interests of the underliers and their stockholders, creditors and indenture trustees respecting those properties." (SMR, page 228, R. 836).

The Court then held, in effect, that the facts did not justify the disregarding of corporate entities; that the leases in question were not equivalent to conveyances in fee, and that the properties leased by the underliers were not the properties of the Debtor, its rights therein being based on the provisions of the leases and the operating agreements.

The question involved in this case is not one of jurisdiction to determine the issues raised; but the correctness of the determinations of the lower court.

It is true that the District Court, in adopting the Conclusions of Law of the Special Master, held that "Without the filing and approval of petitions by or against the several underliers in the manner and form prescribed by the Act of Congress relating to Bankruptcy, this court does not have jurisdiction to reorganize such underliers under such Act or to deal with their properties as though they were the properties of a 'debtor' as the term 'debtor' is defined in such Act." (SMR, page 229; R. 837).

As to the leases made by Monongahela and Birmingham.

We have pointed out at pages 21 to 26 of our petition that these leases were authorized by Pennsylvania statutes and were held to be demises of possessory rights only, by Pennsylvania decisions. At pages 27 to 32 of our petition, we have pointed out that the treatment of leases as demises of possessory rights is provided for in the bankruptcy laws. As we read the opinion of the Circuit Court of Appeals, it does not seriously or directly question the correctness of these decisions, except to say that, "The Pennsylvania statutes do not, nor could they, forbid or delimit the jurisdiction of a federal bankruptcy Court." (R. 948).

But neither the Pennsylvania statutes nor the leases, themselves, delimit the jurisdiction of a federal bankruptcy court; because the bankruptcy laws provide how leases shall be treated. The treatment provided is either affirmance or rejection of the leases.

All replacements, additions, and substitutions of the leased property belong to the lessors.

The brief for respondents Baker, et al., (p. 8), points out that various repairs, replacements, and substitutions of the property originally leased by Monongahela and Birmingham have been made by the lessees, as required by the leases, or by the Debtor, as required by its operating agreements. The statement is then made (p. 8) that the lessee was required to deliver to the lessor "* * * upon termination of the lease only 'like or similar personal property of value equal to the amount of said inventory' which was to be made at the beginning of the lease (See Monongahela Street Railway Company lease, Ex. 3, Document 6)."

Paragraph Fourteenth of the Exhibit referred to, which appears at page 898 of the Record, provides what shall be done upon the termination of the lease. It provides that Monongahela may enter upon and thenceforth have, hold, possess, and enjoy "* * * the hereby demised premises, or such as may be *substituted in their place* and form the subject of this Lease, and take possession of the same, with the appurtenances and with all *additions and improvements thereon,* * * *." (Italics supplied)

The lease made by Birmingham contains a similar provision (R. 908).

These provisions of the leases, we submit, dispose of any question as to the ownership by the lessors of substitutions, additions, and improvements.

The reversal of the District Court by the Circuit Court of Appeals is based mainly, if not entirely, on the disregard of the corporate entities of the underliers.

The gravamen of the decision of the Circuit Court of Appeals is as follows (R. 947):

> "As we see the question, the issue is whether the demand of the facts is to control or whether obeisance must be made to the doctrine of the separate corporate entities of all these concerns which, from the business point of view, constitute one operation and one enterprise * * *."

The final decision of the Circuit Court was to "* * * override the arguments for the recognition of the legal concept of separate entity on the part of the underliers." (R. 952)

We do not speak for other so-called underliers; but, as to Monongahela and Birmingham and the other so-called guaranteed underliers, there is no basis whatsoever for disregarding their separate corporate entities.

As pointed out in our petition, at page 19, not a share of stock of Monongahela or Birmingham is owned by Debtor. Nor is any of their stock owned by Philadelphia or its subsidiaries, except a 24.7% interest in the stock of Monongahela, acquired by Philadelphia or some of its non-railway subsidiaries after the institution of these bankruptcy proceedings. There is no interlocking control by officers, directors, or otherwise, by Debtor or Philadelphia of Monongahela or Birmingham.

In addition to this, the disregard of the corporate entities of Monongahela and Birmingham would not bring their properties into the reorganization proceedings. If the entity of a corporation is disregarded, its stockholders, whether they be one or more, are treated as the owners of the corporate property. Such a treatment would carry the ownership of the properties of Monongahela and Birmingham to the large number of members of the public who own their respective stocks.

The disregard of the corporate entities of Monongahela and Birmingham, therefore, would not bring the properties of those corporations into the reorganization proceedings. It would get these proceedings nowhere.

The theory of equitable merger and consolidation of the so-called underliers is not applicable to Monongahela and Birmingham.

The Guggenheim brief advances the theory that an equitable merger and consolidation has been effected by what is described as a "Unity of life of debtor and of all underliers * * *" (p. 11). It is not clear how corporations are merged or consolidated under this theory.

The Guggenheim brief states—"By piercing the corporate veil of the indenture (contracting) parties and their privies, a merger is effected." (p. 17)

Just what "piercing the corporate veil of the indenture (contracting) parties" means is difficult for us to fathom. It does not seem to mean disregarding the corporate entities of the contracting parties; for a corporate merger could only occur as between recognized corporations. It is not clear which would be the surviv-

ing corporation of the alleged merger—the lessor, the lessee, the lessee's operating company, Pittsburgh Railways, or its parent company and guarantor of the leases, Philadelphia Company.

The brief of Baker, et al., speaks of "* * * a merger in fact of the assets of the Pittsburgh Railways Company and the underlying companies, * * *." (p. 8)

The City does not appear to adopt the merger theory (p. 3).

The opinion of the Circuit Court does not rest on the basis of a merger or consolidation.

If the merger theory is based on the ownership by the Debtor of substantially all of the stock of an underlier, it is not applicable to Monongahela or Birmingham; because there is no such ownership of their stock either by the Debtor or its parent, Philadelphia. The disregard of the corporate entities of Monongahela and Birmingham does not carry their properties to the Debtor.

If the merger theory stems from the long-term leases made by Monongahela and Birmingham to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively, a surprising and totally untenable situation is arrived at. A simple example will clarify this statement.

Suppose Corporation A owns in fee a lot on which it has erected a large and fully-equipped building. As is often done, it makes a long-term lease of the land and building to Corporation B without any cash payment, but in consideration of the payment of rentals by B in the future and its covenants to operate the building and make suitable repairs and replacements thereto and

thereof. After a period of years, B becomes insolvent and goes into bankruptcy reorganization. A is free of debt, but B owes debts of $1,000,000 in excess of its assets.

If the lease results in the merger or consolidation of A and B, then the creditors of B have a claim prior to the stockholders of both A and B on the land and buildings, or on the proceeds of the sale thereof.

If anything is left, it goes to the stockholders of A and B. That would be all that the stockholders of A would receive for the land and building which their money bought and erected, and which were leased without the payment of any purchase price.

Under the merger theory, the stockholders of Monongahela and Birmingham would be in virtually the same situation as the stockholders of Corporation A in the example.

Under the bankruptcy statutes, however, the Trustees of Corporation B would be required either to affirm the lease, under the provisions thereof, or to reject the lease and return the property to Corporation A.

In Pennsylvania, there are statutes providing for both merger and consolidation of corporations with the required approval of stockholders and the issuance of securities to them. Admittedly, the statutory merger proceedings were not followed (City's brief, p. 3).

It is not pretended that there was any intention or attempt by the parties to the Monongahela and Birmingham leases to comply with the requirements of a statutory merger, by reason of which it might be claimed that a "de facto" merger had resulted in analogy to the doctrine of "de facto" corporations.

Both Monongahela and Birmingham own and formerly operated completely integrated street railway systems.

In the City's brief, the following statement is made at page 23:

> "Here, as has been shown, each underlier owns but an inoperable segment of a unified system."

Monongahela leased to Consolidated Traction Company and Birmingham leased to United Traction Company of Pittsburgh a completely integrated street railway system, fully equipped with car houses, cars, tracks, trolley lines, and poles, together with real estate and francnises. The Monongahela lease and the Birmingham lease were both duly recorded and the material parts thereof appear in the Record at pages 885 and 901, respectively.

The properties owned by Monongahela and now in operation include 54.5 miles of track, 13 parcels of real estate, and a car house (SMR, par. 850, R. 798). It reaches the downtown business triangle by a long term trackage agreement with Consolidated Traction Company which was preserved in the lease (R. 895).

The properties owned by Birmingham and now in operation include 24.8 miles of track, and extend from the downtown triangle of Pittsburgh across the Monongahela River to the South Hills (SMR, par. 852, 855, R. 799).

The City states in its brief at page 5 that it will supply the Chief Justice and Justices of this Court with a map showing the franchise locations of each underlier.

As showing the strategic location and extensive properties of Monongahela and Birmingham, we propose to furnish to the Chief Justice and Justices with this Reply Brief a reproduction of a map received in evidence in this case as Exhibit P-70, showing the lines of street railway system owned by Monongahela, its trackage rights to the downtown business district of Pittsburgh, as well as the street railway system owned by Birmingham, all presently in operation.

Of course, Monongahela's and Birmingham's railways are separately "operable". They were successfully and profitably so operated by those companies prior to the leases (R. 393 a, 394 a; SMR par. 880, R. 803).

Philadelphia guaranteed the equipment of the leased lines with the best and most improved equipment for the operation thereof (R. 893, 894) and the ownership by the lessors of all substitutions, additions, and improvements (R. 898, 908).

The leases made by Monongahela and Birmingham are not subject to modification, impairment, or termination by the Pennsylvania Public Utility Commission.

The City's brief (p. 28) quotes from an opinion of the Pennsylvania Public Utility Commission on the first Plan of Reorganization proposed by the Trustees of Debtor. That opinion was rendered in connection with the disapproval of that Plan.

The opinion is there expressed that the reorganized company should conduct all transportation service, by street railway and bus, in the Pittsburgh district. Such, however, is the present situation, with respect to street

railway transportation, and there is no threat of any change therein, as heretofore noted (p. 2, *supra*).

After pointing out that the main purpose of the Public Utility law is to secure "* * * to the public, using and desiring to use them [public utility facilities], reasonably adequate service and facilities at fair and reasonable and nondiscriminatory rates", the opinion continues—

> "Observing the limitation thus placed on our authority, we have not given consideration to the fairness of the Plan of Reorganization in respect of creditors and security holders * * *": *Re W. D. George et al. Trustees of Pittsburgh Railways Co.* (1940), 38 P.U.R. (NS) 434, 437.

We, therefore, submit that this opinion has nothing to do with the issues in this case.

A footnote, at page 29 of the City's brief, seems to argue that the Pennsylvania statutes authorizing the leases made by Monongahela and Birmingham, and those leases themselves, are subject to the regulatory powers of the Commission.

That such is not the case, particularly with respect to leases made before the first Public Service Company Act of July 26, 1913, P. L. 1374, has been decided directly in a number of decisions by the Supreme Court of Pennsylvania.

In the case of *New Street Bridge Co. v. Public Service Commission et al.,* (1921) 271 Pa. 19, the Supreme Court said, at pages 31 and 32:

> "* * * The public is not concerned with a good or bad bargain between lessor and lessee. What they do demand in a complaint such as this,—

and have a right to demand,—is adequate service at reasonable rates, and no more. This is worked out through the duly created substitute on the ground, in visible ownership and occupation of everything in which the public is vitally interested.

"Viewing the question, then, in this light, if the bridge company had leased its entire property and franchise, or had leased a certain part of its property, absolutely to the transit company, divesting itself of all control over the property and franchise for operating purposes for a given time, it would not be within the power of the commission, in a direct proceeding against the bridge company, the underlying company, to reduce the rental. * * *."

Citizens Passenger Railway Co. v. Public Service Commission et al., (1921) 271 Pa. 39, was decided on the same day as the *New Street Bridge* case and followed that decision. The Court said, at page 56:

"Besides, neither the commission nor the public has anything to do with the disposition of the rates which the utility is authorized to collect; nor is it any concern of either that the sum total thereof may not be sufficient to enable the operating company to pay its fixed charges and maintain or extend its service and facilities. The company is entitled to receive a reasonable return for the service it furnishes, and no more; the public is entitled to receive an adequate return for the reasonable rates it pays, and no more. Beyond making sure of these two things, the statute does not vest a greater power in the commission, so far as the matter under consideration is concerned. * * *."

In *Bell Telephone Company of Pa. v. Driscoll et al.*, (1941), 343 Pa. 109, the Supreme Court had to do with the Public Utility Law of 1937, as amended in 1938 (66 PS § 1272). In that case, the Supreme Court held that § 702 of the Public Utility Law, as amended, which requires commission approval of a contract between a public utility and an affiliated interest as a precedent to its validity, is unconstitutional on the ground that it unlawfully delegates legislative powers to the commission.

The agreements of lease made by Monongahela and Birmingham, not having been entered into with affiliates and having been executed long before the creation of any Pennsylvania Public Utility Commission, stand on a stronger basis than the contracts involved in the *Bell Telephone* case.

We submit, therefore, that the Monongahela and Birmingham leases, having been authorized by Pennsylvania statutes, are not subject to modification, impairment, or termination by the Public Utility Commission of Pennsylvania.

Without the filing and approval of petitions by or against Monongahela or Birmingham, they can not be reorganized in bankruptcy proceedings or their properties dealt with as the properties of a debtor in bankruptcy.

This proposition is discussed at pages 32 to 37 of the petition of Monongahela and Birmingham for writs of certiorari.

The only facts which we emphasize here are as follows:

1. Monongahela and Birmingham are solvent and able to meet their debts as they mature; although the Amended Revised Plan of the Trustees was based on the erroneous assumptions that they were insolvent (R. 570) and that petitions for reorganization would be filed by or against them (R. 560).

2. There is no basis for or prospect of petitions for reorganization in bankruptcy being filed by or against them.

3. Neither Monongahela nor Birmingham has filed any claim in the Matter of the Pittsburgh Railways Company, Debtor.

4. Neither Monongahela nor Birmingham has participated in the present proceedings; both having appeared specially therein only in support of their petitions to dismiss the City's petition as to them.

5. Neither Monongahela nor Birmingham has any contractual relations with Pittsburgh Railways Company, their leases having been made to Consolidated Traction Company and United Traction Company of Pittsburgh, respectively, and those lessees having made short-term operating agreements with Pittsburgh Railways Company, with respect to the operation of the lines covered by the two leases, among others.

6. Neither Monongahela nor Birmingham is controlled, directly or indirectly, by stock ownership or otherwise, by Debtor or Philadelphia.

Under these facts, which are admitted or not questioned, it is submitted that a bankruptcy court has neither jurisdiction nor power to reorganize these companies under the bankruptcy laws.

Conclusion.

It is submitted that, in so far as Monongahela, Birmingham, and those corporations which joined in their petitions for writs of certiorari are concerned, the Circuit Court of Appeals erred in reversing the Decree of the District Court and remanding the case for further proceedings not inconsistent with its opinion; that the orders and decrees of the Circuit Court of Appeals should be reversed, in so far as they apply to those petitioners; and that the decree of the District Court dismissing the petition of the City of Pittsburgh as to them should be sustained.

It is further submitted that the petition by Monongahela and Birmingham for writs of certiorari should be granted, for the reasons stated therein and in the brief attached thereto.

Respectfully submitted,

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